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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 838

THE MONTANA POWER COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION AND THE SECRETARY OF THE INTERIOR IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a–46a)[1] are not yet reported.[2] The opinion of the Federal Power Commission (Pet. App. 76a–108a) is reported at 38 FPC 766, and its order denying rehearing (Pet. App. 108a–112a) is reported at 39 FPC 321.

[1] "Pet. App." references are to the separate appendix to the petition filed by The Montana Power Company.

[2] The opinions were rendered by the court on rehearing *en banc*. The opinions of the original panel (Pet. App. 48a–75a) were vacated by order of November 17, 1969.

JURISDICTION

The order on rehearing en banc of the court of appeals (Pet. App. 47a) was entered on July 15, 1970. The petition for a writ of certiorari was filed on October 12, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals was correct in concluding that the Commission had exclusive jurisdiction to readjust annual charges to petitioner for the use of tribal lands under Section 10(e), as amended, of the Federal Power Act.

STATUTES INVOLVED

The pertinent provisions of the Federal Power Act, as amended, 16 U.S.C. 791 *et seq.*, and of the Federal Water Power Act of 1920, 41 Stat. 1063, are set forth in an attachment to the petition.

STATEMENT

The Commission initiated this proceeding as a result of a petition filed in 1959 by the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana (the "Tribes") to readjust the annual charges paid by petitioner, The Montana Power Company, for use of tribal lands in conjunction with the operation of the Kerr hydroelectric project. The Kerr project has been in service since 1939 (Pet. App. 3a, 76a) under a license originally issued in 1930 subject to Section 10(e) of the Federal Water

Power Act of 1920 as then in effect, which authorized the Commission to fix a reasonable annual charge for the use of tribal lands and provided that after 20 years of service the "charges may be readjusted * * * in a manner to be described in each license." Article 30(D) of Kerr project license called for readjustment—on the basis of "the commercial value of the tribal lands involved, for the most profitable purpose for which suitable, including power development"—by agreement of the licensee, the Commission and the Secretary of Interior (then a member of the Commission),[3] or failing agreement by submission to arbitration (Pet. App. 79a–80a). Section 28 of the 1920 Act, which remains unchanged today, 16 U.S.C. 822, provided that no amendment to the Act "* * * shall affect any license theretofore issued under the provisions of this Act, or the rights of any licensee thereunder."

In 1935, Section 10(e) was amended to give the Commission[4] the authority to determine, upon notice and opportunity for hearing and subject to judicial review, the amount of any readjustment of annual charges under Section 10(e). The court below rejected petitioner's contention that the saving clause of Section 28 deprived the Commission of jurisdiction under the 1935 Act over readjustments under licenses issued prior to 1935.

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[3] The Commission was then composed of the Secretary of War, the Secretary of the Interior, and the Secretary of Agriculture (41 Stat. 1063).

[4] The Commission was reconstituted as an independent regulatory agency with five commissioners in 1930, soon after the license was issued (46 Stat. 797).

Background. The original 1930 license was issued by the Commission with the approval of the Secretary of the Interior, to the Rocky Mountain Power Company, a wholly-owned subsidiary of petitioner (Pet. App. 2a–3a). Under this license, Rocky Mountain was authorized to commence within one year, and complete within three years thereafter, construction of a dam and powerhouse containing three generating units (J.A. 239).

Rocky Mountain failed to meet these deadlines as extended, and was in default under its license [5] at the time of the 1935 amendment to Section 10(e) of the 1920 Act mentioned above. In 1936, an amendment to the license was issued by the Commission (J.A. 260–275), extending to 1939 the time for the completion of the first generating unit of the project. The amended license, which was approved by the Secretary of the Interior and the Tribes, contained a waiver of any damage claims by the Tribes arising out of the initial default. In 1938, petitioner became the sole licensee of the Kerr project. The first generating unit became operational in 1939 and the second in 1949 (Pet. App. 89a).

The instant proceedings. As noted above, in the 1959 proceedings initiated by the Commission, petitioner challenged the jurisdiction of the Commission to make the 20-year readjustment in annual charges payable to the Tribes; petitioner argued that Article

[5] While the licensee was in default, the matter was referred to the Attorney General of the United States for proceedings to revoke the license (Pet. App. 30a, 78a). No formal action appears to have been taken on that request.

30(D) of its license, which was not in terms altered by the 1936 license amendment, gave it an absolute right to arbitration in the event the parties involved could not agree on the amount of the readjustment. After almost 10 years of litigation on the jurisdictional and diverse other issues, the Commission decided that it had jurisdiction and awarded the Indians an increase in rental from $238,375 to $950,000 per year effective May 20, 1959. (Pet. App. 76a–77a, 109a.)

On petitions for review, the court of appeals first held that the arbitration provision in Article 30(D) was "a substantive right, embodied in the contract, bargained for and bought by the Commission in its effort to secure a licensee for this project" (Pet. App. 56a). It remanded the case for submission to arbitration (Pet. App. 61a). On rehearing *en banc,* however, the court upheld the Commission's jurisdiction (Pet. App. 1a–46a), holding "that the 1935 statute, which made no changes in the substantive standard applicable under outstanding license for readjustment of tribal land charges, intended to prescribe the Commission as the tribunal for readjustment under outstanding as well as future licenses" (Pet. App. 2a). The court acknowledged that the saving clause of Section 28 of the 1920 Act (*supra,* p. 3) protects a licensee against changes in his substantive rights or duties under a license (Pet. App. 12a–13a), but ruled that that section did not constitute "a general prohibition against changes in the procedure or machinery applicable to a license, changes that do not have the quality of changing substantive rights or obliga-

tions." (Pet. App. 15a).[6] In this respect, the court found that the readjustment of annual charges by the Commission, rather than by an arbitrator, was a permissible change of remedy not constituting a general alteration of substantive rights (Pet. App. 14a).

Since the only issue considered by the *en banc* decision was the jurisdictional issue, the case was referred back to a panel of the court of appeals for a hearing on the merits of the Commission's decision (Pet. App. 47a). The petition for a writ of certiorari followed.

ARGUMENT

The *en banc* decision of the court of appeals is correct and, contrary to petitioner's assertion (Pet. 7–12), presents no direct conflict with prior decisions of this Court. Moreover, no significant questions of general importance are presented by this interlocutory petition, since the decision below that Section 10(e), as amended, applies to pre-1935 licenses turns on interpretations of the intent of Congress and since no readjustment provisions comparable to those in petitioner's license appear in any other license involving substantial annual charge payments.

Petitioner's assertion that the decision below conflicts with this Court's decision in *De La Rama S.S. Co.*

[6] The court was of the opinion that a procedure specified in a license could assume the quality of a substantive right protected by Section 28 if it could be shown that the given procedure had been specifically bargained for by the licensee. Reviewing the record in this case, the court concluded that no affirmative showing had been made that the arbitration provision in the 1930 license had been bargained for.

v. *United States*, 344 U.S. 386, is without merit.[7] That case involved the question whether the general saving statute preserved, as to claims arising before the repeal of the War Risk Insurance Act, the jurisdiction of the United States district courts which had been designated under that Act to hear war risk insurance claims; if the effect of the saving statute had been merely to protect claims arising prior to the repeal without preserving the designated forum for their adjudication, then the Court of Claims would have had sole jurisdiction over such claims. This Court found the language of that saving statute explicit, see 344 U.S. at 389, and ruled that its provisions acted to preserve jurisdiction in the district courts. The Court also relied on the fact that because of conflicting interest provisions, successful claimants would actually recover less in the Court of Claims than in the district courts. 344 U.S. 389–390. Moreover, from the context of the repeal, it was clear that Congress was bringing an end to the war risk insurance scheme without intending to

[7] The allegations of conflict (Pet. 13) with *El Paso* v. *Simmons*, 379 U.S. 497, and *Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198, are equally insubstantial. The court below was fully cognizant of the fact that depending upon the circumstances the preservation of a particular remedy may be necessary to protect a person's substantive rights. But it concluded that this was not true here, just as this Court in *El Paso* v. *Simmons*, *supra*, had held that the State of Texas could validly change the redemption procedures that had been applicable when the property involved had been sold. Nor, as the court below stated (Pet. App. 19a), is *Bernhardt* v. *Polygraphic Co.*, *supra*, inconsistent with the view that the legislature may affect the availability of arbitration by substituting a different and appropriate procedure.

affect the procedures under that scheme for dealing with claims arising prior to the repeal. See 344 U.S. at 391.

By contrast, in this case, the applicable saving provision—Section 28—did not clearly protect procedures written into licenses. Nor did the Section 10(e) amendment affect petitioner's substantive liability. In addition, the 10(e) amendment did not bring an end to federal activity in a given area, but merely effected a procedural change in an ongoing statutory scheme for regulating water power development. Under these circumstances, perception of the congressional intent behind the saving clause of Section 28 of the 1920 Act required a substantial analysis of the considerations unique to this particular statutory scheme.

The analysis and conclusions of the court below as to the effect of Section 28 under the circumstances are, we submit, entirely correct.[8] Moreover, they are consistent with the construction of Section 28 in *Pennsylvania Power & Light Co.* v. *Federal Power Commission*, 139 F. 2d 445 (C.A. 3), certiorari denied, 321 U.S. 798. In that case, the Third Circuit held that Section 28 did not preclude Congress from directing

[8] In view of these conclusions, the court of appeals found it unnecessary to consider whether petitioner's claim that its rights under the 1930 license were protected by Section 28 was undercut by its default under the license at the time Section 10(e) was amended (Pet. App. 30a–31a). An alternative ground for sustaining the decision below rests on the fact that petitioner's actual authorization to construct the two units involved stems from the 1936 amendment to the license accepted subsequent to the amendment of Section 10(e).

the Commission, rather than a district court, to determine a licensee's net investment under pre-existing licenses.

The court below was also on solid ground in concluding that Congress, in amending Section 10(e) in 1935, intended to prescribe a procedure for determining annual charge readjustments that would apply uniformly to all matters later set for decision, whether under new or existing licenses; a different reading of congressional intent would have produced the anomalous situation of having different procedures for determining annual charges for related aspects of the same project (Pet. App. 13a, 17a–19a).[9]

Finally, the court was fully warranted in rejecting petitioner's alternative contention that the arbitration provision in the 1930 license had been bargained for as a major element in the license and thus was tantamount to a substantive right (Pet. App. 20a–28a). We rely on the court's detailed analysis of this issue.[10]

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[9] Such an anomaly would exist with respect to the Kerr project itself, as petitioner put into operation in 1954 a third generating unit pursuant to a license issued well after the 1935 amendment to Section 10(e). Under petitioner's view of this case, readjustments for annual charges for the use of Indian lands with respect to the third generating unit would have to be made under a different procedure than readjustments with respect to the first two units constructed under the 1930 license.

[10] Petitioner asserts (Pet. 15) that upon any remand to the Commission, it would offer evidence to show that the provision for arbitration was a significant factor in petitioner's decision to accept the 1930 license. But petitioner has had its opportunity to introduce such evidence in the protracted proceedings before the Commission.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970